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In The

Supreme Court Of The United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

vs.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

*Ronald L. Day
Suite 260
6303 Waterford Blvd.
Oklahoma City, OK 73118
(405) 842-5988

Charles J. Cooper
Shaw, Pittman, Potts
& Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Attorneys For Petitioner

*Counsel of Record

Balmar Legal Publishing Division, Washingotn, DC 20005 (202) 659-3610

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INTRODUCTION

The central issue now before this Court was aptly framed by the Ninth Circuit in a closely analogous case decided over a decade ago: "'If not now, and on this showing, when, and on what showing,' will the governance of the school system be restored to the elected officials who are charged with that governance under state law?" *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1240 (9th Cir. 1979). Respondents' answer to this question is direct: not in the foreseeable future, and perhaps never.

According to Respondents, the district court in this case is obliged to retain its remedial jurisdiction — and to enforce the school district's continued compliance with a comprehensive system of race-based student assignments and cross-town busing — until such time as the neighborhoods of Oklahoma City are fully integrated. Respondents make no claim that the desegregation decree entered by the

district court (and designed by Plaintiffs themselves) was either intended to remedy or capable of remedying residential segregation, and they offer no suggestions as to how either the district court or the school board could desegregate the City's neighborhoods. To the contrary, Respondents admit that the school district's predominantly black northeast quadrant (the "Afro-American ghetto,"[1] as Respondents put it) is all-black simply "because whites will not move into it" — a phenomenon over which the district court and the school district have absolutely no control. Resp. Br. 47. Nonetheless, according to Respondents, the district court will not be relieved of its responsibility to superintend the operations of the school system until whites move into and fully integrate the "ghetto." Thus, the ultimate responsibility for establishing a unitary school system rests not on the school board, but on white residents of Oklahoma City.

If Respondents' startling submission is correct, no major formerly *de jure* segregated school system in the country can hope to achieve unitary status in the foreseeable future, however long it may have labored in good faith to fulfill the requirements of a comprehensive school desegregation decree. We defy Respondents to cite one. Respondents' contention is not supported — indeed, is refuted — by this Court's decisions.

ARGUMENT

Respondents advance three basic arguments. First, they argue that the school board's constitutional violation entitled them to a permanent injunction requiring "the board to conduct its affairs in such a way as to prevent resegregation." Resp. Br. at 38. Such an injunction may be modified or dissolved, according to Respondents, only upon the showing required by *United States v. Swift & Co.*, 286 U.S. 106 (1932) — that the injunction "had been turned through changing circumstances into an instrument of wrong." *Id.* at 115. This showing cannot be made in the face of continued residential segregation, which Respondents contend is a lingering vestige of the prior dual system.

[1] The school district's northeast quadrant is certainly no "ghetto." *Dowell v. Board of Education of Oklahoma City Public Schools*, 677 F. Supp. 1503, 1511 n.4 (W.D. Okl. 1987).

Second, Respondents argue that a finding of "unitariness," even if properly entered here by the district court, does not authorize the school district to adopt a neighborhood elementary school policy if it results in the re-establishment of virtually all-black student bodies in ten elementary schools that were identifiably black when the decree was entered in 1972. Such a result, according to Respondents, would be inconsistent with this Court's decisions holding that actions by a school system that is under a duty to desegregate must be judged by their effect, rather than by their purpose.

Finally, Respondents contend that a school system cannot achieve unitary status unless the system will remain racially balanced "in the face of *any* non-invidiously motivated change in pupil assignment procedures that the board may subsequently adopt," including a neighborhood school policy. Resp. Br. at 55. In this case, therefore, the Oklahoma City Public School System could properly be found unitary only if "over the years the Afro-American ghetto had been substantially integrated and . . . the Afro-American population was distributed throughout the school district . . . ." Resp. Br. at 56.

Thus, each of Respondents' arguments reduces to a single point: that residential integration is a prerequisite to dissolution of a school desegregation decree. As we demonstrate below, however, Respondents' arguments are without merit, including their threshold claim that the district court's 1977 unitariness finding had no binding effect on them.

I. THE DISTRICT COURT'S 1977 FINDING OF UNITARINESS IS PRECLUSIVE UNDER THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL

Certiorari was granted in this case to resolve, *inter alia*, a conflict among the circuits on the significance of a finding that a school district has achieved "unitary" status. Of the circuits which have addressed this issue, only the Tenth Circuit has concluded that a finding of unitariness in itself does not entitle a school district to be released from a desegregation decree. *Dowell v. Board of Education of Oklahoma City Public Schools*, 890 F.2d 1483, 1492 (10th Cir. 1989); *contra*, *Riddick v. School Board of City of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 419 U.S. 938 (1986); *United States v. Overton*, 834 F.2d

1171 (5th Cir. 1987). Respondents and their *amici* step away from this issue and, to support their argument that the decree should not be dissolved, now suggest the finding of unitariness entered by the district court in its 1977 order was not a veritable "unitary" declaration.[2]

The record in this case demonstrates without question that the district court's 1977 order was a true declaration of unitariness which signified that disestablishment of the dual school system was complete, and that the vestiges of unlawful discrimination in Oklahoma City had been eliminated. As a preliminary matter, it is important to remember that the district court's 1977 order was *not* appealed and became final. A *final* order must be interpreted in light of the other opinions, findings, and conclusions in the case. *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 295 (1943). Two particular opinions handed down in this case prior to the entry of the 1977 finding of unitariness reveal there was no confusion about the district court's intent to retain jurisdiction until the dual school system in Oklahoma City had been completely disestablished.

A decade before the district was found unitary and jurisdiction was relinquished, the Tenth Circuit instructed the district court to retain jurisdiction "until such time as the court [was] satisfied that the decreed unconstitutional practices [were] eliminated and appellant board [was] found to be in full compliance with the teachings of the *Brown* case." *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F.2d 158, 168 (10th Cir. 1967). Further, in 1972 when the district court ordered the school board to implement the Finger Plan, it candidly acknowledged that in light of the intervening decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), it had prematurely closed the case for a short period during

[2] The court of appeals, on the other hand, never questioned the validity of the unitary finding entered in 1977. Rather, it concluded, as did the district court, that the 1977 finding of "unitariness . . . became final, and . . . [was] binding upon the parties." *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1522 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). Therefore, when the court of appeals held "a finding of unitariness [does not] mandate the later dissolution of the decree with proof of substantial change in circumstances which led to the issuance of that decree," *Dowell v. Board of Education of Oklahoma City Public Schools*, 890 F.2d 1483, 1492 (10th Cir. 1989), it recognized that the Oklahoma City school system had achieved unitary status. The court of appeals thus correctly held the 1977 unitary finding preclusive, but incorrectly ruled on its effect.

the 1970-71 school year. *Dowell v. Board of Education of Oklahoma City Pubiic Schools*, 338 F. Supp. 1256, 1258 n. 1 (W.D. Okl. 1972). However, the court made clear that it would from that point forward "retain jurisdiction and evaluate the plan in practice and to see that state-imposed segregation was completely removed." *Id.*

Also, there was no doubt that unitary status was the ultimate goal of implementing the Finger Plan. In 1972 when the court ordered the implementation of the Finger Plan, it recognized that "[p]laintiffs [were] entitled to a decree requiring the reasonably immediate conversion of the Oklahoma City Public Schools into a unitary school system," and ruled that "[t]he defendant school board ha[d] an affirmative duty to convert to a unitary school system in which racial discrimination would be eliminated root and branch." *Id.*, at 1272. Moreover, the court found "[t]he [Finger] Plan would, if adopted and implemented in good faith, create a unitary system." *Id.*, at 1271.

Therefore, when the school board in 1975 filed its Motion to Close Case alleging that it "[h]ad eliminated all vestiges of state--imposed racial discrimination . . ., and [was] operating a unitary school system" (J.A., vol. I, 30), there was no confusion about the import of the question the board had placed at issue.

Plaintiff's counsel promptly submitted a letter to Judge Bohanon and filed a brief arduously opposing the board's motion. In the letter counsel asserted "that not all roots and branches of discrimination in the system [had] been eliminated." J.A., vol. I, 33. In the brief, counsel argued the case could not be dismissed until "disestablishment had been achieved" nor until "racial discrimination through official action [w]as eliminated from the school system." J.A., vol. I, 34-35, citing *Swann* at 32. "[T]hat hoped for status ha[d] not yet been reached," counsel stated. J.A., vol. I, 34-35. Thus, counsel argued that the court "must retain jurisdiction." J.A., vol. I, 36.

After the school board and the Bi-Racial Committee filed reports with the court concerning the state of desegregation in the schools (J.A., vol. I, 23), the court set the Motion to Close Case down for an evidentiary hearing. When the hearing opened on the morning of November 11, 1975, Judge Bohanon reminded the parties that "a duty [was] imposed upon the court under the Constitution to require the

school board to desegregate a dual school system and to complete a unitary school system." J.A., vol. I, 40.

During opening statements, counsel for the board reiterated the court had "a duty to close [the] case if the system ha[d] achieved unification." J.A., vol. I, 43. In response, counsel for the plaintiffs stated: "[O]ur position is that the test of whether or not the Court can relinquish jurisdiction is whether or not all *vestiges of segregation* or racial discrimination have been eliminated." J.A., vol. I, 44-45 (emphasis added).

The court received extensive testimony and evidence from both parties on the question whether the Oklahoma City School Board had eliminated the vestiges of unlawful segregation and had achieved unitary status. J.A., vol. I, 46-173. Following the evidentiary hearing, the school board and Bi-Racial Committee continued to file required reports with the court. J.A., vol. I, 23.

On January 18, 1977, more than a year after the evidentiary hearing on the board's Motion to Close Case, Judge Bohanon entered the "Order Terminating Case." J.A., vol. I, 174. In the order the court found the Finger Plan "was indeed a plan that worked and that substantial compliance with constitutional requirements ha[d] been achieved." J.A., vol. I, 174. The court found that a "unitary system" had been "slowly and painfully accomplished over the sixteen years during which the cause ha[d] been pending." J.A., vol. I, 175. "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races," the court said, "the board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of the court." J.A., vol. I, 175. The "Order Terminating [the] Case" dissolved the Bi-Racial Committee and "terminated" all further "jurisdiction" in the case. J.A., vol. I, 175-176.

The record therefore confirms that the district court found unitary status had been achieved only after a careful hearing and review of all aspects of the board's operations to ensure that all vestiges of prior discrimination had been eliminated and that the dual school system had been completely dismantled. The court's statement in the 1977 order, that it "d[id] not foresee that the termination of its jurisdiction w[ould] result in dismantlement of the plan" (J.A., vol. I,

174-175), was simply an observation made in light of testimony at the hearing that the board at that time did not intend to alter its busing program. J.A., vol. I, 103-104. The court certainly did not *order* the board to continue to implement the plan, and obviously did not foresee the plan would be followed indefinitely. Indeed, the order released the board "to pursue in good faith its legitimate policies without the continuing constitutional supervision of th[e] Court."[3]

We are at a loss to understand how Respondents can now argue that the issue whether they "are 'bound' by the 1977 finding of unitariness because they did not appeal the order is of absolutely no consequence . . . [since] . . . the order did not . . . adversely affect their rights." Resp. Br. at 36 n.26. Fifteen years ago they knew the court's ruling adversely affected their rights. They steadfastly opposed the board's Motion to Close Case, arguing jurisdiction could not be terminated because all "vestiges of segregation" had not been eliminated. Irrespective of the reasons Respondents chose not to appeal the 1977 order, the fact remains it became *final*. Respondents are therefore precluded from collaterally attacking[4] that order by virtue of the doctrines of *res judicata* and collateral estoppel.

In *Allen v. McCurry*, 449 U.S. 90, 97 (1980), the Court recognized that a case in the nature of a suit in equity "presents no categorical bar to the application of *res judicata* and collateral estoppel concepts." The doctrine both promotes fairness by ensuring that the parties who have had a full opportunity to litigate an issue are bound

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[3] Further, the court's statement is not inconsistent with a finding of unitariness and its accompanying devolution of control to the school district. The word "foresee" in fact implies that discretion regarding continuation of the decree was being returned to the school district, as the word implies speculation as to how the school district will exercise its restored authority. Moreover, this is the only interpretation consistent with Judge Bohanon's opinions in 1985 and 1987, in which he expressed no surprise regarding the school board's change in the busing plan, and in fact upheld it as a valid exercise of the authority returned to the board in the 1977 order. Those opinions indicate that what the Judge foresaw in his 1977 order was exactly what the school board did – maintain the tenets of the plan in effect for a number years until demographic changes rendered the plan oppressive at the elementary grade level.

[4] *See* Resp. Br. at 57 ("Given the facts in this case the 1977 'unitariness' finding could not and did not meet these standards."); *id.* at 58 ("the district court's unitariness finding was not based on a sufficient factual predicate").

by the result, and conserves judicial resources by decreeing an end to litigation.

This Court has adopted a policy of "rigorous application of *res judicata*." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 400 (1981).[5] Consequently, in 1985 when Respondents sought to collaterally attack the unitary finding in their challenge to the grades 1-4 neighborhood school plan, the district court found it preclusive:

> [T]his court's finding in 1977 that a *unitary system* had been achieved by the Oklahoma City Public Schools is *res judicata* as to those who were then parties to this action . . . . There's been no showing in this case that the original Plaintiffs did not validly and fairly represent all those whose rights are concerned here. The present [Respondents] are, therefore, *collaterally estopped* from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977.

Dowell, 606 F. Supp. 1548, 1555 (W.D. Okl. 1985) (emphasis added). The court of appeals absolutely agreed: "When . . . the [district] court determined that the implementation of the Finger Plan had resulted in *unitariness* within the district, that finding became *final*, and it, too, is *binding* upon the parties with equal force." *Dowell*, 795 F.2d 1516, 1522 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986) (emphasis added). Accordingly, it is the *law of this case* that the Oklahoma City School District achieved unitary status in 1977. The uncompromising principles of *res judicata* and collateral estoppel preclude any attempt to evade that finding in these proceedings.

In addition, contrary to the suggestion of *amicus* United States (Br. at 21-22), there is no need to remand this case to the Tenth Circuit for a determination of the district court's intent with respect to its unitary finding. Here, the district court has twice interpreted its own 1977 order. In 1985 the court stated:

[5] Consistent with this concept, a number of lower courts have applied the principles of collateral estoppel or issue preclusion to school desegregation cases. *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731 (9th Cir. 1985); *Bronson v. Board of Education of City School Dist.*, 687 F.2d 836 (6th Cir. 1982). Indeed, the Fourth Circuit has held that these principles apply to a final declaration of unitary status. *Riddick v. School Board of City of Norfolk*, 784 F.2d 521, 531 (4th Cir.), *cert. denied*, 419 U.S. 938 (1986).

> At the time [the] court totally relinquished its jurisdiction over [the] case in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the school district had achieved the goal of being a desegregated non-racially operated and unitary school system.

Dowell, 606 F. Supp. at 1554. In 1987, the court again confirmed that unitary status had been achieved in 1977:

> This court fully intended in 1977 to restore the school board to total independence and relinquish to the board all control over the school district . . . because the Oklahoma City Schools were at that time, as they are today, operating a unitary system, wholly without discrimination to blacks or other minority students, faculty or staff.

Dowell, 677 F. Supp. at 1506.[6]

In desegregation cases, this Court has recognized the need to defer to the district court's on-the-spot knowledge of local conditions at the time it acted. *Swann*, 402 U.S. at 28. Consequently, the district court is "best able to interpret its own orders." *Vaughns v. Board of Education of Prince George's County*, 758 F.2d 983 (4th Cir. 1985); *United States v. Board of Education of Chicago*, 717 F.2d 378, 382 (7th Cir. 1983).[7]

In sum, the question presented for resolution is not the validity of the unitary finding, but rather its effect. For the reasons stated in our opening brief, the Tenth Circuit erred when it concluded that the district court's binding declaration of unitariness did not entitle the school district to be released from the desegregation decree.

[6] Just as important, the district court found in 1985 and again in 1987 that the school district had maintained unitary status from 1977 to date. *Dowell*, 606 F. Supp. at 1555; *Dowell*, 677 F. Supp. at 1515-1519.

[7] A remand to the Tenth Circuit for a determination of whether Judge Bohanon in fact declared the district unitary in 1977 would make no sense. The Tenth Circuit would certainly have no basis for ruling that what Judge Bohanon said he meant in the order, and in two subsequent rulings, was not what he meant. Moreover, the Tenth Circuit, as noted above, has already answered this question, stating that Judge Bohanon indeed entered a "binding" declaration that the school district was unitary in 1977.

II. THE *SWIFT* STANDARD DOES NOT APPLY TO A SCHOOL DESEGREGATION BUSING DECREE

Relying on *Swift*, Respondents argue (Resp. Br. at 33-34), and the majority below held (Pet. App. at 11a-12a), that a school desegregation decree cannot be dissolved or modified without "a clear showing of grievous wrong evoked by new and unforeseen conditions . . . ." 286 U.S. at 119. An injunction, to qualify for modification under *Swift*, must cause defendants "hardship so extreme and unexpected as to justify [the court] in saying that they are the victims of oppression." *Id. Swift* involved an injunction prohibiting private meatpackers from engaging in various monopolistic practices. The standard in *Swift* is appropriate for *proscriptive* injunctions that impose a ban *intended to be permanent* on certain actions found unlawful or dangerous. It makes sense to continue such a ban indefinitely, absent exceptional circumstances compelling modification. Applying the *Swift* standard, however, in the entirely different context of a school desegregation remedy wholly misapprehends the *prescriptive* nature of such a remedy and fails to recognize that "the ultimate objective of the remedy is to make whole the victims of unlawful conduct." *Milliken v. Bradley*, 433 U.S. 267, 280 n.15 (1977) (*Milliken II*).

This Court's decisions have consistently stressed, particularly in the school desegregation area, that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . ." *Milliken II*, 433 U.S. at 282; *accord id.* at 286 n.17 ("[I]t must always be shown that the constitutional violation caused the condition for which remedial programs are mandated.").

These "fundamental limitations on the remedial powers of federal courts," *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 399 (1982), were applied in a school desegregation context in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*). There, the lower courts had found that various acts by the Detroit Board of Education and state officials had created and perpetuated racial segregation within the Detroit school district. The remedy, however, had been extended to 53 of the 85 suburban school districts surrounding Detroit on the theory that "any less comprehensive a

solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems . . . ." *Bradley v. Milliken*, 484 F.2d 215, 245 (6th Cir. 1973). This Court reversed, holding that the proposed multi-district remedy went beyond the constitutional violation because there had been no demonstration that the unconstitutional acts committed by officials of the Detroit school system had caused any significant racial segregation in the suburban school districts. As the Court noted (418 U.S. at 746) (emphasis added):

> [A desegregation] remedy is necessarily designed, as all remedies are, to *restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.* Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.[8]

Just as *Milliken I* makes clear the *geographic* make-whole limitations on judicial authority, this Court's decision in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), makes clear the *temporal* make-whole limitations on such authority: in neither instance may courts go beyond redressing the conditions caused by the identified violation. The district court in *Spangler* established in 1970 a system-wide student assignment plan designed to implement its order mandating that no school in the district have "a majority of any

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[8] These limitations on judicial remedies were reaffirmed in the school desegregation context in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) (*Dayton I*). In that case, the district court had ordered implementation of a comprehensive district-wide desegregation plan. Concluding that the evidence of constitutional violations failed to establish the necessity of a system-wide desegregation plan, this Court held that the lower court should have "tailor[ed] a remedy commensurate to the [Board's] . . . specific violations . . . ." *Id.* at 417. Accordingly, the case was remanded for formulation of a remedy precisely tailored to cure the board's violations, and no more. On remand, the lower courts were to "determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." *Id.* at 420, citing *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 213 (1973).

minority students." *Spangler*, 427 U.S. at 428-429. The school district achieved the racial percentages mandated by this order in the first year of the plan's implementation, but gradually "slipped out of compliance" (*id.* at 433) with the "no majority" requirement during ensuing years. In 1974, the school district unsuccessfully moved the district court to dissolve the "no majority" order, and the court of appeals affirmed. *Id.* at 431-432.

This Court vacated the court of appeals' judgment, identifying the essential question in the case as "the extent of a district court's authority in imposing a plan designed to achieve a unitary school system . . . ." *Id.* at 429. In concluding that the district court had exceeded its remedial authority in mandating certain racial percentages among students in Pasadena schools, the Court emphasized that the desegregation plan ordered by the district court was "designed to achieve a unitary school system" (*id.* at 429), and that "[t]here was . . . no showing . . . that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants." *Id.* at 435.[9] In summing up its conclusions, the Court stated (*id.* at 436-437) (emphasis in original):

> In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the [school board] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

The clear lesson of *Spangler* is that, once a constitutionally acceptable, properly tailored student assignment plan has been ordered by the court, full and faithful implementation of the plan remedies prior segregative pupil assignments. And when the constitutional violation has been remedied – that is, when the victims of the constitutional violation have been restored to the position they would have occupied in the absence of the violation – a federal court necessarily loses its authority to direct the operations of the school district. Decision-making power over the system must then be returned to local officials, governed once again by traditional equal protection standards, which prohibit only purposeful acts of discrimination.[10] *See* Pet. Br. at 15-18.

[9] In so holding, the Supreme Court applied to the Pasadena system the logic of *Swann*, 402 U.S. at 32-33; *see* Pet. Br. at 26.

Thus, the majority below plainly erred in pronouncing that "the condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing." Pet. App. 13a. Again, this principle is correct in the case of proscriptive injunctions, where mere compliance with a prohibition on wrongful conduct is no reason for altering the prohibition. But it makes no sense in the case of make-whole relief, where achieving a specific condition is the whole purpose of the injunction, and once that condition is achieved there is no longer any legal rationale for continuing the injunction.

Save for the majority below, every court of appeals to consider the question has grasped the distinction between proscriptive and make-whole relief and, instead of applying the *Swift* standard, has held that once the make-whole purpose of the decree is achieved, the school district is unitary and the decree must be lifted. *Spangler v. Pasadena*

[10] Contrary to Respondents' contention, *Spangler* did not "ma[k]e it clear" that "the rule of *United States v. Swift & Co.*" governs school desegregation cases. Resp. Br. at. 27, 35. *Spangler* cited *Swift* only as one authority for the broad proposition that, even before a school district succeeds in dismantling a discriminatory dual school system, changed circumstances may require modification of an injunctive decree which has become "final." 427 U.S. at 437. *Spangler* does *not* require a "clear showing of grievous wrong evoked by new and unforeseen conditions." *Swift*, 286 U.S. at 119; *compare* Resp. Br. at 26-27, 33-41. Similarly, *Swann* did not hold that "school desegregation cases are governed by the same standards as are all other cases that lie in equity," logically requiring application of the *Swift* standard. Resp. Br. at 35-36. In *Swann* this Court said that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." 402 U.S. at 15. *Swift* did not involve the denial of a constitutional right, and its exacting "standard" is not properly applicable here. *See* Pet. Br. at 33-37.

City Board of Education, 611 F.2d 1239 (9th Cir. 1979); *id.* at 1245 n.5 (Kennedy, J., concurring and criticizing use of the *Swift* standard for school desegregation decrees); *United States v. Overton*, 834 F.2d 1171, 1174-1177 (5th Cir. 1987) (expressly criticizing and rejecting the Tenth Circuit's opinion in *Dowell I*); *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987); *Riddick*, 784 F.2d at 534-539; *Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d 945 (11th Cir. 1989). Indeed, even a later panel of the Tenth Circuit has accepted this view. *Keyes v. School District No. 1*, 895 F.2d 659, 669 (1990). *See also Money Store, Inc. v. Harriscorp Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) (Posner, J., concurring) (explaining the inapplicability of the *Swift* standard to relief designed to reform public agencies).[11]

Swift therefore, does not establish the correct standard for determining whether a school desegregation decree may be terminated or modified. As established above, a school desegregation decree should be dissolved once a school district achieves unitary status. *See also* Pet. Br. at 25-33. The decision of the majority below consequently must be reversed.

III. THE SCHOOL DISTRICT IS NOT REQUIRED TO CONTINUE BUSING BECAUSE OF HOUSING SEGREGATION

Respondents assert that the residential segregation now making ten elementary schools in Oklahoma City almost all-black is not *de facto* but *de jure*. Respondents attribute this residential segregation to the school board on the theory that the board "increased and exacerbated" residential segregation by imposing neighborhood schools on state-imposed segregated housing from 1955 to 1972. Resp. Br. at 30, 42-45. The City's residentially segregated neighborhoods today are allegedly the natural effects of the school board's policies up to 1972. Resp. Br. at 46-47. Accordingly, Respondents claim the district court was "wrong as a matter of law" when it found that prior discrimination had become "attenuated beyond a shadow" by 1977. Resp. Br. at 45.

[11] Extension to the school desegregation context of the *Swift* standard for dissolving injunctive decrees also ignores both the right of the public school board to regain control and authority over the school district once past constitutional violations are corrected and the strong public interest in restoring such local control. *Milliken I*, 418 U.S. at 741-742; *Keyes*, 413 U.S. at 245-247 (1973) (Powell, J., dissenting); 20 U.S.C. § 1701(a)(2); Okla. Stat. Tit. 70, § 1210.20.

Respondents assert that the school board "has a permanent and continuing obligation to . . . eliminate or neutralize" the black "ghetto" (Resp. Br. at 48), which "remains the most dramatic vestige of the dual [school] system." Resp. Br. at 47.[12]

The short answer to Respondents' argument is that the Oklahoma City School District was correctly found unitary in 1977 under the standards established by this Court's decisions, particularly *Spangler* and *Swann*. As demonstrated previously, once a school district achieves unitary status, full decision-making authority is restored to the local school officials, whose conduct is governed once again by traditional equal protection standards. The school district may then depart from the desegregation plan as it chooses, unless such departures are motivated by discriminatory intent and consequently amount to a new constitutional violation. *Swann*, 402 U.S. at 32; *Washington v. Davis*, 426 U.S. 229 (1976); *see* Pet. Br. at 37-39. A policy of neighborhood schools does not of itself establish discriminatory intent or a constitutional violation, even when underlying housing segregation results in some segregation in the schools. *Swann*, 402 U.S. at 28; *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 537-538 n.15 (1982). Respondents have pointed to no possible new constitutional violation causing housing segregation since the unitariness declaration in 1977.

Moreover, the district court in this case found that the school board is not responsible for present housing segregation in Oklahoma City. Pet. App. at 176-186. Indeed, the court found that the policies of the school board since 1972 when the desegregation decree was implemented have reduced housing segregation in the City. *Id.* at 186. The record contains more than substantial evidence in support of these findings. Pet. Br. at 44-46, 48-50. Respondents' conclusory and unsupported[13] assertion that the system of neighborhood schools

[12] The black "ghetto" cannot be eliminated, Respondents admit, because whites will not move into it, however many blacks move out of it. Resp. Br. at 40, 44-45.

[13] Respondents report, without citation, that the district court "previously" found that the reinstated geographic attendance zones "perpetuate[d] and exacerbate[d] racial segregation." Resp. Br. at 52. The district court found in 1963 that the school board's minority-to-majority transfer plan was designed to perpetuate, encourage, and maintain segregation *in the public schools*. 219 F. Supp. 433, 441-42. It found in

Footnote continued on next page.

adopted in 1955 "intensified and exacerbated" *de jure* residential segregation in the City cannot suffice to make the express contrary findings of the district court clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564 (1985).[14]

To overcome the fact that the school board simply is not responsible for present residential segregation in Oklahoma City, Respondents argue, in essence, that this Court's decisions impose upon the school board an affirmative and permanent duty to desegregate the school system and that the school board cannot, consistent with that duty, adopt a neighborhood school policy until such time as the neighborhoods are integrated. According to Respondents, a school

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1965 that neighborhood schools superimposed over already existing residential segregation continued segregation *in the schools* because black students were then locked into black residential areas. 244 F. Supp. 971, 976. The district court did not find that the school board had caused residential segregation. To the contrary, it found in 1987 that the school board was not a cause of current residential segregation. Pet. App. at 15b-19b. Moreover, the district court also found that blacks are no longer "locked into" particular neighborhoods, and the transfer policy now in effect is majority-to-minority.

[14] The conclusion of the majority below is ambiguous. After stating that the question it was deciding was whether the district court correctly found that the currently challenged changes to the busing plan "maintained unitariness in student assignments," the majority states only that the district court "clearly erred in its findings of fact . . . ." Pet. App. at 40a-41a. In any event, the majority below surely did not apply the proper standard in determining whether the district court's findings of fact were clearly erroneous. Under the correct standard, "where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574. The majority did not go through the record to determine whether the evidence permitted the district court's conclusions on various findings of fact. Instead, it pointed to "sharply contrasting views" or "conflicting evidence" in the record, discussed "divergent testimony," recalculated (erroneously) statistics offered by expert witnesses, countered some evidence and testimony by citing alternative evidence and testimony, sided with some experts in their methodology disputes with other experts, and noted that the district court "did not reference" or "did not address" certain conflicting evidence. Pet. App. at 23a-39a. In the end, the panel majority "total[ed] all of the evidence," and concluded that the district court "clearly erred in its findings of fact," despite its recognition that there was "evidence to facially support the district court's findings." Pet. App. at 40a-41a. In other words, the majority below clearly reweighed the evidence, contrary to the requirements for factual review on appeal. *See also* Pet. Br. at 44-50.

system cannot be found unitary so long as the City's neighborhoods are segregated. Alternatively, Respondents argue that "[t]he only consequence of a finding of 'unitariness' . . . is that a district court may relinquish active supervision of a school desegregation case subject to its being reopened if there is, as here, a deviation from the decree resulting in resegregation." Resp. Br. at 48. The very authorities on which Respondents rely in opposing the actions taken by the school board, however, authorize those very actions, absent proof of a discriminatory purpose.

First, Respondents are at pains to distinguish *Spangler*, which, for the reasons we have previously discussed (*supra*, at 11-13), is fatal to their position. Indeed, here the school board's case is far stronger than was that of the school board in *Spangler*. The Oklahoma City school system has been successfully desegregated for a generation of students, whereas in *Spangler* the school board successfully complied with the requirements of the desegregation decree in only the first year of its implementation and had not achieved a totally unitary system when it sought modification of the decree. 427 U.S. at 436. Nevertheless, this Court held in *Spangler* that the district court there lacked authority to require the school district to manipulate attendance zones to "ensure that the racial mix desired by the court [is] maintained in perpetuity." *Id. Spangler* thus makes clear that the Oklahoma City School Board cannot be required to manipulate attendance zones to ensure the desired racial mix is maintained in every school in perpetuity – especially after the school system has been unitary for a generation.[15]

Nor is Respondents' position supported by *Swann*. Under *Swann*, Respondents argue, a district court cannot terminate a desegregation decree until all "vestiges of the prior [dual school] system" – including in this case the black "ghetto" – "have been removed and not simply neutralized." Resp. Br. at 56-57. Since the

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[15] Justice Marshall's dissent in *Spangler*, joined by Justice Brennan, demonstrates how profoundly Respondents have misread that case. In Justice Marshall's view, the district court did have authority to require the school district in *Spangler* to adjust attendance zones "*until* . . . a unitary system is established." *Id.* at 443 (emphasis in the original). Justice Marshall expressly disapproved the district court's opinion that it could require continuous redistricting "even *after* the court has determined that its plan has been effectively implemented." *Id.* at 444 n.1 (Justice Marshall's emphasis).

"ghetto" persists, the school board must continue to neutralize its effects by busing.

In *Swann* this Court addressed the standards that must be met in establishing a satisfactory plan for dismantling a dual school system, *not* the standards that a once-dual school district must meet after it becomes unitary. *Swann* expressly viewed a court-ordered school desegregation plan as "an interim corrective measure" to be applied during an "interim period." 402 U.S. at 27-28. *Swann* recognized, moreover, that even during that interim period, the duty to disestablish a dual system "does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24. Only when the school board planned to retain one-race schools within the system during the "interim" transition period to unitary status did *Swann* require the school board to prove that such one-race schools were not the result of the board's present or past discrimination. *Id.* at 26-28. *Swann* nowhere prohibits the re-establishment of neighborhood schools *after* a unitary system has been established. To the contrary, *Swann* makes clear that judicial intervention in the student assignment policies of a school district that has achieved unitary status should be based only on proof that school authorities "deliberately" sought to bring about racial segregation. 402 U.S. at 31-32; Pet. Br. at 26. Moreover, *Swann* nowhere requires elimination of residentially segregated neighborhoods as a precondition for ending limited court control of schools.

Respondents principally rely on *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972), and its companion case, *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972). *Wright*, however, does not stand for the the proposition that reinstituting neighborhood schools in 1985 "must be judged according to whether it hinders or furthers the process of school desegregation" — as Respondents assert. Resp. Br. at 40 n.30, 46 n.33. To the contrary, *Wright* underscores the point of *Spangler* and *Swann*: different standards apply to a school board that is attempting to dismantle a dual school system and to a school board that has successfully achieved a unitary system.[16]

[16] *Wright* and *Scotland Neck* do stand for the proposition that the actions of a school board *that has not yet dismantled its dual system* must be judged by their effect, not their purpose. Resp. Br. at 53-54.

Wright, like *Spangler* and *Swann*, involved the initial implementation of a desegregation plan aimed at establishing a unitary school system. This Court refused to permit the City of Emporia, within which were located both of the surrounding county's all-white schools, to create for itself a new independent school district after the county had been ordered to dismantle its dual school system. Emphasizing the narrowness of its ruling, the Court held "*only* that a new school district may not be created where its effect would be to impede the process of dismantling a dual system." *Id.* at 470 (emphasis supplied). The district court's injunction did "*not* have the effect of locking [the city] into its present circumstances for all time." *Id.* (emphasis supplied). "Once the unitary system ha[d] been established and accepted" — as it has been here — the city might, "if it still desire[d] to do so, . . . establish an independent system." *Id.*

In sum, this Court's decisions make clear that the Oklahoma City School Board may now legitimately determine that the interests of all students in grades 1-4 will be best served by assigning them to schools in their own neighborhoods (while giving the parents of any students consequently assigned to a school in which their race is in the majority the option of sending their children instead to some other school).

Finally, we submit that residential segregation, even if caused in part by a past school board violation, should not of itself be sufficient to prevent a finding that unitariness has been achieved. This Court has never indicated that busing must continue until residential segregation has been eliminated.[17] School districts are only required to remove vestiges of segregation to the "greatest *possible* degree . . . taking into account the practicalities of the situation." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971) (emphasis added); *accord Swann*, 402 U.S. at 26. School districts do not have the power

[17] *Amici* National Association for the Advancement of Colored People and Citizen's Commission on Civil Rights, argue that the school board should be required to take affirmative action to counter housing segregation caused in part by its past violations, offering in addition to continued busing a number of possible residential incentives and development programs that could be provided by the school board and other local agencies. Br. at 11-16. But given the declaration of unitariness in 1977, there is no legal basis for imposing such mandates on the school board now. Even without the 1977 unitariness declaration, plaintiffs did not request such relief to counter housing segregation when the original desegregation decree was adopted in 1972, and there is no legal basis for adding such requirements now.

to control and remove housing segregation, and neither do the courts. To nevertheless compel busing until residential segregation disappears would impose a harsh burden on innocent school children for generations to come and would effectively displace local control of the schools for decades, if not in perpetuity. These burdensome effects should be considered among the "practicalities of the situation" in determining when a school desegregation decree should be lifted, and the elimination of residential segregation (whatever brought it about) should not be a prerequisite to achievement of unitary status.

CONCLUSION

For the foregoing reasons the decision of the Tenth Circuit Court of Appeals should be reversed, and the decision of the district court should be affirmed and reinstated in its entirety.

Respectfully submitted,

Charles J. Cooper
Shaw, Pittman, Potts
& Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

(202) 663-8000

*Ronald L. Day
Suite 260
6303 Waterford Blvd.
Oklahoma City, OK 73118

(405) 842-5988

Attorneys For Petitioner
*Counsel of Record